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No. 96-1590

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE and ORIN PARKER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

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STATEMENT

Respondents are politically active voters who by writing and speaking seek to influence the views and actions of members of Congress, executive officials, and the public concerning U.S. foreign policy in the Middle East. Respondents filed a complaint with the Federal Election Commission (FEC or Commission) claiming that the American Israel Public Affairs Committee (AIPAC)--a wealthy lobbying group with a full-time paid staff, several offices, and an annual budget of nearly ten million dollars--is a "political committee" required by law to disclose the amounts and beneficiaries of its election campaign contributions. Pet. App. 2a. After investigation, the FEC found that AIPAC routinely has made undisclosed campaign contributions:

> AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns.

J.A. 37; Pet. App. 3a-4a. Evidence obtained by the FEC showed that AIPAC's extensive contributions have been systematically carried out by its staff for many years. J.A. 43-97, 126-27; Pet. App. 3a-4a.[1]

Under 2 U.S.C. § 431(4), whether an organization making "contributions" is a "political committee" depends solely on a quantitative standard--whether the aggregate contributions are "in excess of $1,000 during a calendar year." The FEC found that AIPAC's campaign contributions "likely ... crossed

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[1] Contrary to the unsupported assertion of amicus American Civil Liberties Union, ACLU Br. at 2, AIPAC's campaign contributions were neither sporadic nor small in amount. *See also* Pet. App. 29a, n. 13.

the $1,000 threshold," J.A. 146; Pet. App. 4a. Nonetheless, the FEC found "no probable cause to believe" that AIPAC is a political committee. J.A. 146; Pet. App. 4a, 95a. The FEC based this decision solely on its conclusion that

> AIPAC's campaign-related activities ... constitute only a small portion of its overall activities and does [sic] not appear to be its major purpose.... AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

J.A. 146; Pet. App. 4a. In announcing this holding the FEC neither discussed nor cited any precedents. *Id.*

Respondents filed suit. They contended that the FEC's "major purpose" standard is contrary to law. Though court holdings embrace a "major purpose" test, this test is different from the test announced by the FEC. Case law holds "major purpose" to be a criterion for determining *whether* an activity undertaken *independently* of a candidate *is* an election "expenditure." Case law does not apply any "major purpose" test at all to "contributions"--expenditures that are not independent, but coordinated with candidates. Nor does case law hold that an organization spending more than $1,000 annually on elections--whether independently or in coordination with candidates--is exempt from "political committee" status if election spending is merely "a small portion" of the group's undertakings.

Respondents argued below that a political group like AIPAC is not exempt simply because its wealth enables it to make large campaign contributions using only a small portion of its ten million dollar budget. Rather, the Constitution

exempts from political committee status only small issue-advocacy groups that limit their campaign activities to occasional, independent expenditures, and that are *so* small that administrative requirements imposed on political committees would unduly burden them, *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*), or small, unpopular groups that would be harassed if they complied with political committee disclosure obligations. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982).[2]

The FEC asserted, however, as it does here, that obiter dicta in *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), imposes the Commission's major purpose test. The en banc Court of Appeals disagreed. The court acknowledged that the *Buckley* dicta could be read literally to support the Commission's view, App. 21a; but the court undertook a deeper analysis. It examined what the FEC's brief ignores--the lower court cases which the *Buckley* dicta cited. Pet. App. 25a-26a, and n. 11. These cases--*United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972) (*NCFI*) and *American Civil Liberties Union v. Jennings*, 366 F. Supp. 1041 (D.D.C. 1973) (*ACLU*) (three-judge court), *vacated as moot sub nom. Staats v. ACLU*, 422 U.S. 1030 (1975)--are the only precedents in which "major purpose" is an element of the holding, rather than dicta. The Court of Appeals held that these cases, and the court's discussion in *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), reject the FEC's view. It held the cases support respondents' interpretation of the major purpose test, under which "it is the purpose of the

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[2] *MCFL* and *Brown* exempt groups from specific administrative or disclosure obligations, rather than from political committee status, itself. There is no claim that AIPAC qualifies for exemption under either *MCFL* or *Brown*.

organization's disbursements, not of the organization itself, that is relevant." Pet. App. 26a.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that respondents have standing, under both the Article III and zone-of-interests tests, to seek disclosure of the beneficiaries and amounts of AIPAC's campaign contributions. Pet. App. 6a-18a. The standing issue is neither novel nor complex. Respondents are voters who seek disclosure of information which Congress specifically intended voters to have--both to aid their own exercise of the franchise and to enable politically-active voters, such as respondents, to inform other voters, government officials, and the public at large.

The only difference between respondents and litigants under the Freedom of Information Act is that respondents seek an order requiring the government to enforce disclosure obligations applicable to a third party, rather than to disclose information the government already has. This difference raises only the questions of causation and redressability, which the court below correctly resolved. Since the FEC's erroneous legal interpretation was the agency's sole reason for exempting AIPAC from the disclosure requirement that respondents seek to enforce, respondents' injury is directly traceable to the administrative ruling they challenge. The FEC does not dispute this point. A ruling on the merits in respondents' favor would establish AIPAC's legal obligation to disclose the information respondents seek. A disclosure order by the FEC is the natural, appropriate, authorized, and available remedy to enforce that obligation. In these circumstances, it cannot be said, as a matter of law, that respondents' likelihood of obtaining redress is merely speculative. To the contrary, it is the FEC's opposing assertions that are mere speculation.

On the merits, the Court of Appeals properly held that the FEC's major purpose test is contrary to law. Pet. App. 18a-29a. While dicta originating in *Buckley* can be read to support the Commission's view, the FEC ignores that this same dicta approved lower court holdings that announced a very different test. No holding by this Court supports the Commission's position.

The fundamental goal of the Campaign Act is to prevent *quid pro quo* corruption and the appearance of that corruption stemming from large campaign contributions. Given this goal, the *amount* of an organization's undisclosed contributions, not whether the amount constitutes a major or minor part of the organization's budget, is the relevant consideration. The Court of Appeals properly held that the Commission's major purpose test "would wholly eviscerate" the statute, since "an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget would not." Pet. App. 27a. The FEC's erroneous major purpose test would eviscerate the statute by exempting AIPAC from any obligation to disclose its campaign contributions. No other disclosure provision besides that applicable to political committees would ensure that AIPAC's campaign contributions are revealed.

The FEC's major purpose test is neither necessary to avoid the danger the FEC has identified, nor effective in achieving avoidance of that danger. Though the Act requires political committees to disclose all of their receipts and disbursements, the FEC's test is not necessary to avoid compelled disclosure of the portion of a group's activities that are not campaign-related. Large, wealthy, sophisticated organizations like AIPAC can easily avoid this danger simply by administrative arrangements establishing for campaign activity either a

separate organization or a special segregated fund. Groups whose activities present no appearance or danger of *quid pro quo* corruption, and that would be unconstitutionally burdened by these administrative arrangements, or harrassed if disclosure occurred, are entitled to appropriate exemption under the First Amendment.

In cases such as AIPAC's, where an organization not entitled to constitutional exemption has used a portion of its budget for campaign activities, without making administrative arrangements to separate those activities from pure issue advocacy, the FEC may use its enforcement discretion to limit compelled disclosure to just the campaign-related activities. Respondents here seek only such an order. The FEC's major purpose test therefore is not necessary to avoid the danger of overbroad disclosure.

Nor would the FEC's test prevent compelled disclosure of pure issue advocacy. The FEC's test requires that campaign activity be only *a* major purpose, not necessarily *the* major purpose of an organization, in order to subject the organization to disclosure of all receipts and disbursements. Pet. Br. 38-39, n. 14. Under the FEC's test, groups whose primary activity is issue advocacy still would be subject to disclosure of those activities if campaign activity also were a major organizational purpose.

Simply put, the FEC's major purpose test makes no sense.

ARGUMENT

I. Respondents Have Standing to Sue

A. Respondents Meet the Article III Test

Non-disclosure of information, revelation of which is required by law, is injury sufficient to confer standing under Article III. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449-50 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). If this were not true, no one would ever have standing to contest in federal court a federal agency's refusal to disclose information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq*. Like FOIA litigants, respondents requested disclosure through administrative proceedings authorized by statute and filed suit under a statute specifically conferring a right of judicial review.[3]

Respondents' injury is not a "generalized grievance." As the Court held in *Public Citizen*,

> The fact that other [voters] or groups of [voters] might make the same complaint after unsuccessfully demanding disclosure under [the Campaign Act] does not lessen [respondents'] asserted injury, any more than the fact that numerous citizens might request the same information under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue.

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[3] Under 2 U.S.C. § 437g(a)(1), "[a]ny person who believes a violation of [the Campaign] Act . . . has occurred, may file a complaint with the Commission." Another provision of the Act, § 437g(a)(8)(A), states that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party" may seek judicial review.

491 U.S. at 449-450.

The only difference between respondents and FOIA litigants is that respondents seek an order requiring the government to enforce disclosure obligations applicable to a third party, rather than to disclose information the government already has. This difference raises only the questions of causation and redressability, which the Court of Appeals analyzed in detail and correctly resolved. Pet. App. 14a-15a.

Since the FEC's erroneous legal interpretation was its sole reason for exempting AIPAC from the disclosure requirement that respondents seek to enforce, respondents' injury is directly traceable to the administrative ruling they challenge. The FEC's brief does not dispute this point, which establishes causation. *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997) ("injury produced by determinative . . . effect upon . . . someone else" is "fairly traceable" to that effect; standing does not require "injury as to which the defendant's actions are the very last step in the chain of causation").

It is also "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 1163. Judicial correction of the agency's legal error will, under the FEC's own findings, obligate AIPAC to disclose the information respondents seek.[4] The FEC does not argue that

[4] The FEC erroneously argues that respondents lack standing because the FEC might, under *Chamber of Commerce v. FEC*, 69 F. 3d 600 (D.C. Cir. 1995), reverse its prior finding that AIPAC's communications to its supporters were contributions rather than exempt intra-corporate communications. Respondents recognize that this issue needs to be revisited by the Commission on remand. At that time, respondents will argue that (1) *Chamber of Commerce* does not require reversal of the (footnote continued)

an order requiring AIPAC to disclose the amounts and beneficiaries of its campaign contributions would be unconstitutional. *See* Pet. Br. at 48. The FEC argues only that AIPAC should not be obliged to disclose "non-campaign-related receipts and disbursements." Pet. Br. at 42. Respondents, however, do not seek disclosure of AIPAC's non-electoral activities.

The FEC does not dispute that, if AIPAC has a legal obligation to disclose the beneficiaries and amounts of its campaign contributions, the Commission has authority to order AIPAC to disclose this information. A disclosure order is the appropriate, natural remedy for violation of a disclosure obligation. This remedy is available here. The FEC's suggestion, Pet. Br. 29, that disclosure might not be an available remedy, because AIPAC might not have "retained

FEC's finding; (2) alternatively, even if AIPAC's communications were intra-corporate, and therefore not contributions themselves, the campaign contributions generated by those communications were contributions by AIPAC, making AIPAC a political committee, because the contributors acted on behalf of, and through, AIPAC, *see* Pet. Br. at 9, n. 3 (AIPAC not only communicated to supporters, but acted "as a contact between its supporters and various candidates"); and (3) there is evidence, and evidentiary leads which the FEC failed to explore, pointing to significant campaign contributions by AIPAC of a kind other than staff communications to supporters, *see* the opening brief respondents submitted to the appellate panel below, at 10-28; *see also* Pet. App. 29a, n. 13 ("investigation here likely would have been insufficient to support a finding that AIPAC's contributions were not 'a' major purpose"). If respondents prevail on any of these three points, and prevail on the "major purpose" issue, AIPAC will be obligated to disclose its campaign contributions. Respondents therefore have standing to present these points, as part of their claim on the merits. Contrary to the FEC's erroneous argument, the need to revisit a prior FEC finding does not deprive respondents of standing to sue. Standing does not turn on whether a plaintiff's arguments on the merits are likely or unlikely to succeed.

the information sought by respondents," is absurd. The notion that AIPAC's staff, leadership, and thousands of dues-payers all cannot remember which candidates AIPAC supported in past elections, that they all might have forgotten what they did to support the election campaigns, that the AIPAC staff might have forgotten what their salaries were, and that there might be no records indicating anything on any of these subjects, is belied not only by a casual reading of the Joint Appendix, but by common sense and the voluminous evidence and evidentiary leads contained in the remainder of the administrative record.

The FEC's assertion, Pet. Br. at 29, that it is "far from clear" and there is "no guarantee" that disclosure will be ordered, if unlawful failure to disclose is found, is itself mere speculation. A similarly speculative assertion could be made in every case challenging the FEC's dismissal of an administrative complaint. Mere speculation cannot render a natural, appropriate, authorized, and available remedy "unlikely," as a matter of law.[5]

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[5] The foregoing is dispositive, but it is noteworthy that the FEC has not even asserted that it would be unlikely to issue, or would be opposed to issuing, an order requiring AIPAC to disclose the beneficiaries and amounts of its campaign contributions, if the Court were to hold AIPAC obliged to disclose this information. The FEC has not identified a single administrative or judicial decision in which a fine, rather than a disclosure order, was held to be the appropriate remedy for violation of the Campaign Act's disclosure obligations. Nor has the FEC explained why a fine would be appropriate, or likely, where disclosure is an available remedy. The Court of Appeals held "that if the Commission gave only lip service to compliance with our order and settled with AIPAC without requiring disclosure, . . . [respondents] would be able to seek disclosure directly" under 2 U.S.C. § 437g(a)(8)(C). Pet. App. 15a. The FEC's brief does not dispute this holding.

B. Respondents Meet the Zone of Interests Test

Respondents also meet the non-constitutional, zone-of-interests test for standing. This test "is not meant to be especially demanding." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that two of the three purposes of the Campaign Act's disclosure requirements were intended to serve the information interests of the public, the electorate, and each individual voter:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.
>
> * * *
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . . A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.
>
> * * *
>
> Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [established by other sections of the campaign finance law].

424 U.S. 67-68. (Footnotes omitted.)

The Campaign Act recognizes that ballot-box decisions by individual voters are a primary means of fighting the threat and appearance of *quid pro quo* corruption involving elected officials and campaign contributors. The Act recognizes that

each individual voter is entrusted with governmental power, equal to that of every other voter, to decide which candidates are, or may be, corrupted by campaign contributions, and to cast their ballots accordingly. The disclosure provisions of the statute are intended to arm voters with information about campaign contributions to better enable them to make their individual ballot-box decisions. The interest of each voter in information about campaign contributions is squarely within the zone of interests intended to be served by the statute.

The Campaign Act also recognizes that another potent weapon against corruption, and the appearance of corruption, is publicity. Publicity is the principal means by which voters receive campaign finance information useful to their exercise of the franchise. Publicity also is a direct weapon. It may induce officeholders to change views, reverse actions, or acknowledge errors before the next election, so that the electorate need not vote against them to achieve reform. Publicity also arms the public at large, empowering it to press officeholders for reform, where publicity by itself is an insufficient inducement. The information interests of the public, and the information interests of those who would inform officeholders and the public about campaign contributions, through speaking and writing, are plainly within the zone of interests intended to be served by the Act.

The Court of Appeals therefore properly held "that Congress treated the broad class--voters--as the core beneficiaries of the statute," Pet. App. 17a, and that for this reason respondents meet the non-consititutional test for standing.[6]

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[6] The FEC's argument, Pet. Br. at 22-23, that respondents' suit "rests on 2 U.S.C. § 437g(a)(8)(A)," and that this statute "should be given a narrow construction," is off the mark. The zone-of-interests test concerns the interests protected by the specific statute alleged to have been (footnote continued)

II. The FEC's "Major Purpose" Test is Contrary to Law

The FEC's "major purpose" test conflicts with the fundamental goal of the Campaign Act. This goal is to prevent corruption and the appearance of corruption that result when "large contributions are given to secure a political *quid pro quo* from current and potential office holders." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Given this goal, the *amount* of an organization's election spending, not whether the amount constitutes a major or minor part of the organization's budget, is the relevant consideration. The Court of Appeals properly held that the Commission's major purpose test "would wholly eviscerate" the statute, since "an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget would not." Pet. App. 27a.[7]

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violated. *Bennett v. Spear*, 117 S. Ct. 1154, 1167 (1997). Respondents claim that AIPAC violated disclosure obligations contained in 2 U.S.C. § 434. The FEC does not dispute that respondents, as voters, are core beneficiaries of these disclosure obligations.

[7] Contrary to the FEC's brief at 47, the reasoning of the Court of Appeals would not exempt from political committee status an organization devoting $1 million of its $100 million budget to independent expenditures, rather than contributions. The court held "it is the purpose of the organization's disbursements, not of the organization itself, that is relevant." Pet. App. 26a. Thus, if the major purpose of an organization's independent disbursements is to influence elections, then those disbursements are "independent expenditures." *NCFI*, 469 F.2d at 1141. All organizations that make independent expenditures exceeding $1,000 in a year are political committees, except to the extent a constitutional exemption under *MCFL* or *Brown* applies. Under *MCFL*, exemption of an organization would be warranted only if "the administrative burdens associated with such spending were unconstitutional as applied to it." Pet. App. 24a. A small organization like MCFL would be unconstitutionally burdened unless such spending were its major (footnote continued)

Given the goal of the statute, it makes no sense to exempt a dual-purpose organization simply because election spending is its "minor" purpose, carried out by one department, while other departments pursue the "major" purpose. This is particularly true if the organization's major purpose is lobbying for favors from legislators to whose campaigns the organization contributes. A systematic program of lobbying linked to campaign contributions, implemented continuously over a number of election cycles, presents both an appearance and a danger of *quid pro quo* corruption. "[C]ampaign-related activities and communications ... undertaken as an adjunct to, and in support of, ... lobbying efforts," J.A. 146--in other words, precisely what AIPAC does--are the principal concern of the Act.

Under the erroneous "major purpose" standard announced by the FEC, lobbying organizations that use campaign contributions to wield influence in Congress are exempt from political committee status if their size, wealth, and power enable them to attain their goals by spending on elections only "small portions" of their large bank accounts. This is not a permissible construction of the statute. It defeats the fundamental purpose of the law. Courts "must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election*

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purpose. *Id.* AIPAC, however, is a large, wealthy, sophisticated organization that would not be burdened by compliance with administrative requirements. Nothing in the opinion below would exempt AIPAC from political committee status if it made large independent expenditures, as opposed to contributions, using a small portion of its large budget.

Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981).[8]

Contrary to the FEC's brief at 47, the FEC's proposed evisceration of the statute is not "inherent in *Buckley*'s 'major purpose' test." While a literal reading of dicta in *Buckley* could support the FEC's view, the *Buckley* dicta noted with approval the decisions in *NCFI* and *ACLU*, which adopted a very different test.

In *NCFI*, the court considered whether a $17,850 newspaper advertisement was an "expenditure," and whether "solely on the strength of this one advertisement and contributions made in response to it" the National Committee must be deemed a "political committee." *Id.* at 1138. To determine whether the advertisement was an "expenditure" the court construed the statutory definition's key phrase, "made for the purpose of influencing [an] ... election." Interpreting the statute to avoid First Amendment issues, *id.* at 1140, the court held

> We ... construe the words "made for the purpose of influencing" in [the statutory definitions of "contribution" and "expenditure"] to mean an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents.... We also construe the Act to apply only to committees soliciting contributions or making *expenditures the major*

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[8] The FEC's major purpose test is also contrary to the statute's unambiguous quantitative standard--"in excess of $1,000 during a calendar year"--which governs whether an organization making campaign contributions is a political committee. For this reason as well, the FEC's test cannot be deemed a valid interpretation of the statute. *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984).

> *purpose of which* is the nomination or election of candidates. [Emphasis added.]

469 F.2d at 1141.

Two points are important here. First, the *NCFI* court applied the "major purpose" test only to *independent* disbursements--those made without coordination with a candidate. Second, the court held "major purpose" to be a criterion for determining *whether* a particular independent disbursement *is* an election "expenditure." The court did not hold that an organization found to be making independent expenditures is exempt from the Act unless those types of disbursements are the major purpose of the organization overall.

Applying its holding to the advertisement at issue, the court concluded the ad was not an "expenditure":

> Here neither statutory test is met: any authorization or control by any candidate--indeed any connection whatsoever between the National Committee and any candidate--is missing and *the major purpose of the advertisement* was to promote the impeachment movement and to condemn governmental policy on the Vietnam war, *not to elect candidates*. [Emphasis added.]

469 F.2d at 1141.

Having announced this holding, the court went on to say, in dicta, that its interpretation of the phrase "for the purpose of influencing ... [an] election" might make "enforcement of the Act ... somewhat more burdensome, as the supervisory officials will be forced to glean the principal or *major purpose of the organizations* they seek to have comply with the Act." *Id.* at 1142. (Emphasis added.) In light of the court's analysis

and holding, its reference to "major purpose of the organizations" concerns the organizations' major purpose *in making particular disbursements*. The court did not address the major purpose of an organization in general, as distinguished from the organization's purpose in making particular payments. The court did not face, and had no reason to consider, a situation in which a group's major purpose, overall, might be different from the organization's major purpose in making a particular disbursement.

In *ACLU*, the court considered an advertisement similar to the ad in *NCFI*. The court adopted the *NCFI* holding. The court stated that holding as follows:

> [T]he Court [in *NCFI*] promulgated a dual statutory test limiting the reach of Title III: (1) the determinative phrase "made for the purpose of influencing," is to include only those expenditures "made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents," and (2) Title III is applicable "only to committees soliciting contributions or making *expenditures the major purpose of which* is the nomination or election of candidates." 469 F.2d at 1141.

366 F. Supp. 1057 (emphasis added). The phrase "major purpose of the organization" does not appear in *ACLU*.[9]

In *Buckley*, plaintiffs claimed the reporting and disclosure provisions applicable to political committees were overbroad "in their application to minor-party and independent candidates and in their extension to contributions as small as

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[9] The ACLU's amicus brief, at 16-17, mischaracterizes *NCFI* and *ACLU v. Jennings*.

$11 or $101." 424 U.S. at 61. No other challenge to these provisions was raised. *Id.* at 60.[10]

The *Buckley* plaintiffs also challenged former § 434(e) (now, 434(c)), the disclosure provision applicable to persons other than political committees. *Id.* at 61. The Court noted that disclosures required of these persons are of special concern because "the relation of the information sought to the purposes of the Act may be too remote." *Id.* at 79-80.[11]

In discussing this issue, the Court, in dicta, said the phrase, "for the purpose of . . . influencing [an] election," also should be narrowly construed in the provisions applicable to "political committees." This phrase, the Court reasoned, "could be interpreted to reach groups engaged purely in issue discussion." 424 U.S. at 79. The Court cited *NCFI* and *ACLU*, with approval, 424 U.S. at 79, n. 106, and then added:

> To fulfill the purposes of the Act [the words "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.

[10] The Court declined to issue a "blanket exemption" for minor parties, 424 U.S. 72-74, holding instead that they would be entitled to exemption from disclosure requirements upon showing "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. The Court reaffirmed this approach in *Brown*. Under *Buckley* and *Brown*, the First Amendment grants exemption from disclosure only on an as-applied, case-by-case basis where specific showings are made.

[11] The Court held this concern properly could be met by deeming independent "expenditure" to mean "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

> Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Like *NCFI* and *ACLU*, *Buckley* said the problem lies in the vagueness and potential overbreadth of the phrase "for the purpose of influencing [an] election." As in *NCFI*, *Buckley*'s discussion of "major purpose" concerned the problem of determining when an organization's activities should be deemed "expenditures." The Court said that expenditures could be presumed to be campaign related if they were made by "an organization the major purpose of which is the nomination or election of a candidate."

The reasoning in *Buckley* did not conclude that the phrase "political committee," itself, must be given a narrowing construction *in addition to* that which results simply from construing narrowly the phrase "for the purpose of influencing ... [an] election." *Buckley* did not suggest that *two* "major purpose" tests apply--one to determine whether an activity is an expenditure, then another to determine whether making these expenditures is a group's major purpose overall. Nor is there any language in the statute that could bear such a construction.

The aim of the discussion in *Buckley* was to ensure that "groups engaged *purely* in issue discussion" would not be deemed "political committees." 424 U.S. at 79. (Emphasis added.) The Court did not address circumstances in which the major purpose of an organization, overall, might be different from the major purpose of one or more of the organization's expenditures. It did not consider the question of dual- or multi-purpose organizations. *Buckley* did not say that discussion groups which also make campaign disbursements "fall[ing] within the core area sought to be addressed by

Congress" are nonetheless exempt from regulation--no matter what the amount of their election spending--provided "issue discussion" is the major purpose of the organization overall.[12]

In *MCFL*, the Court mentioned "major purpose" in dicta discussing circumstances that would render a small issue advocacy group a political committee. As recounted in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, (1990), the *MCFL* Court held

> that a federal statute requiring corporations to make independent political expenditures only through special segregated funds, 2 U.S.C. § 441b, burdens corporate freedom of expression.... The Court reasoned that the *small* nonprofit corporation in that case would face certain organizational and financial hurdles in establishing and administering a segregated political fund.... These hurdles "impose[d] administrative costs that many *small* entities [might] be unable to bear" and "create[d] a disincentive for *such* organizations to engage in political speech." [Emphasis added.]

In addition to the burden that would be imposed on MCFL, due to its small size, the Court noted that MCFL was a nonprofit corporation with no funding from business

[12] During the ten years after *Buckley*, the FEC issued numerous advisory opinions applying the legal test for "political committee" designation. None of them suggested that an organization making "expenditures" or "contributions" exceeding $1,000 in a year would be exempt from "political committee" designation if these expenditures or contributions were a "small portion" of the organization's overall activities, or if election spending were not a major purpose, or not the major purpose, of the organization. Pet. App 28a, n. 12.

corporations or labor unions.[13] The Court also stressed that MCFL's election activity was limited to occasional independent expenditures. 479 U.S. at 252 and 252 n. 6.

The Court said that independent expenditures produce speech at the core of the First Amendment, 479 U.S. at 251, and that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-260. The Court held that MCFL's occasional independent political activity posed no "threat of the danger that has prompted regulation," and that administrative requirements which would burden the small organization therefore were not justified. *Id.* at 263. The Court, in dicta, at 262, added the following caveat:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. See *Buckley*, 424 U.S., at 79.

Thus, the *MCFL* dicta said that "extensive" independent election spending would render even a small "issue advocacy" organization a political committee. Nothing in the opinion implied that constitutional concerns require exemption of a wealthy organization that makes extensive campaign contributions in support of its lobbying, posing a potential threat of *quid pro quo* corruption. Nor did the Court say that its concern for the impact of administrative burdens on small organizations would extend to a large sophisticated organization with a full-time paid staff already accustomed to meeting many administrative requirements. The *MCFL* Court

[13] AIPAC, however, unlike MCFL, does receive some contributions from corporate bank accounts. J.A. 150-51; Pet. App. 25a, n. 10.

neither held nor suggested that a wealthy lobbying group routinely making contributions exceeding $1,000 per year is exempt from political committee designation, provided its contributions are only a "small portion" of its large budget.[14] Nothing in *MCFL* requires evisceration of the statute by an across-the-board narrowing construction based solely on "budget portion" or overall organizational purpose.

The FEC's major purpose test is not only contrary to the goal of the statute, but also unnecessary and insufficient to accomplish the FEC's objective. The FEC says that, since political committees have a statutory obligation to disclose all of their receipts and disbursements, not just those related to election campaigns, the Commission's major purpose test

> serves to address the danger that relatively small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose the much broader category of non-campaign-related receipts and disbursements that are its primary activity, including receipts and disbursements used for issue advocacy.

Pet. Br. at 45. But large, wealthy, sophisticated organizations like AIPAC can easily avoid this danger simply by administrative arrangements establishing, for campaign activity, either a separate organization or a special segregated fund.[15] *See Regan v. Taxation with Representation*, 461 U.S.

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[14] Nor did FEC advisory opinions issued after *MCFL* so hold or suggest. Pet. App. 28a, n. 12. It was only after this litigation began that FEC advisory opinions started to reflect the FEC's major purpose test. *Id.*

[15] Contrary to the assumption of amicus Brennan Center's brief, at 18, no new regulations are needed. AIPAC could have set up a separate segregated fund. AIPAC's leaders or supporters could have set up a separate organization.

540 (1983). Organizations whose activities present no appearance or danger of *quid pro quo* corruption and that would be unconstitutionally burdened by these administrative arrangements, or harrassed if disclosure occurred, would be entitled to appropriate exemption under the First Amendment.

In cases such as AIPAC's, where enforcement proceedings establish that an organization not entitled to constitutional exemption has used a portion of its budget for campaign activities, without making administrative arrangements to separate those activities from pure issue advocacy, the FEC may use its enforcement discretion to limit disclosure orders to just the campaign-related activities. Respondents here seek only such an order. Any organization subjected to an unconstitutionally-overbroad FEC disclosure order would be entitled to challenge the order in court and obtain appropriate relief. The FEC's major purpose test therefore is not necessary to avoid the danger of overbroad disclosure.

Nor would the FEC's major purpose test accomplish the goal the FEC seeks to attain. Since the FEC's test requires that campaign activity be only *a* major purpose, not necessarily *the* major purpose of an organization, in order to subject the organization to disclosure of all receipts and disbursements, Pet. Br. 38-39, n. 14, groups whose "primary activity" is issue advocacy still would be subject to disclosure of those activities if campaign activity also were a major organizational purpose.

The FEC's test, which is entitled to no deference,[16] is not only unnecessary and ineffective, but also overbroad. As

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[16] The FEC maintains that its major purpose test is a narrowing construction required by constitutional concerns. These concerns, however, are not within the Commission's special expertise. The FEC's view of the Constitution is entitled to no deference. *See* Pet. App. 20a.

noted above, the test would eviscerate the statute by exempting from disclosure not only non-campaign activities, but also campaign contributions. The FEC asserts that its test ensures that campaign expenditures in "small amounts" or made "only occasionally" will not trigger obligations to disclose non-campaign-related activity, Pet. Br. at 21, but AIPAC's contributions were neither small in amount, nor occasional, Pet. App. 3a-4a, 29a, n. 13., and the FEC's test is not limited to circumstances involving small or occasional contributions. On the contrary, the FEC's test would exempt organizations that flood every election with millions of dollars of contributions, provided they spend many more millions of dollars for other purposes--such as lobbying for favors from the officials whom the campaign contributions helped to elect.

Contrary to the FEC's brief at 48, the disclosure obligations applicable to others are no substitute for the statutory requirement that political committees disclose their campaign contributions. The obligation to disclose independent expenditures does not apply, because AIPAC's activities are contributions, not independent expenditures. The recipients' obligation to report contributions they receive is ineffective, since candidates and their committees do not know all of the campaign activities undertaken on their behalf by AIPAC, let alone the amount of money AIPAC has spent on them.[17] It is AIPAC that knows this information. It is AIPAC that must be ordered to disclose it.[18]

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[17] The FEC has access to every candidate's disclosure statements, yet it has not identified a single one that has reported receiving any of AIPAC's extensive in-kind campaign contributions.

[18] These points aside, the Court of Appeals properly held the FEC's argument about other statutory obligations to be irrelevant, since "[t]here is no indication that Congress intended to limit one section in light of others or to make their application mutually exclusive." Pet. App. 27a.

This is a simple case. The FEC's major purpose test makes no sense. It is unnecessary to accomplish the FEC's objective. It is ineffective at accomplishing that objective. It would eviscerate the statute by exempting campaign contributions from disclosure.

AIPAC meets the statutory definition of a "political committee" because it routinely makes "contributions" to candidates in aggregate amounts likely exceeding $1,000 per year. Nothing more is required. The statutory obligations imposed on political committees are not unconstitutional as applied to AIPAC. The *MCFL* exemption applies to organizations that only occasionally make independent expenditures posing no threat or appearance of corruption, where the organization, due to its small size, would be unduly burdened by the Act's administrative requirements. AIPAC's election activities are "contributions," not "independent expenditures." They are not "occasional." They are extensive, multi-year activities presenting an appearance and potential threat of *quid pro quo* corruption. AIPAC is a large, sophisticated organization with a paid full-time staff that would not be unduly burdened by the administrative duties imposed by the Act. AIPAC made no such claim during the FEC proceedings, and nothing in the record would support such a finding. Nor is there any basis for exemption of AIPAC under *Brown*.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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